FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 5 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 469

ANNE FEINBERG,

Petitioner,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

SUPPORTING BRIEF.

EARL EDWIN SEYFARTH,
208 S. La Salle St.,
Chicago 4, Illinois,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

SUBJECT INDEX.

PAGE

Appendix 15

Argument 7-14

Summary of Argument.

I.

The statute declares void every attempted limitation of liability in a carrier's rules, receipts and tariffs—except where the shipper declares or agrees in writing to a declared or released value..... 7-10

49 U. S. C. A. 20 (11)—See Appendix.

Caten v. *Salt City Movers & Storage Co., Inc.*, 149 F. (2d) 428.

The decision of the Circuit Court of Appeals upholding limitation provisions in respondent's rules, receipts and tariffs, is clearly erroneous—as petitioner never declared or agreed to any value in writing..... 9

II.

A truck driver not in a shipper's employ has no implied authority to bind the shipper to a limitation of the carrier's liability.....10-11

New v. *Chicago, etc. Ry. Co.*, 171 Ill. App. 488.

Hill v. *Adams Express Co.*, 77 N. J. L. 19, 71 Atl. 683.

Benson v. *Oregon, etc. R. R. Co.*, 35 Utah 241, 99 Pac. 1072.

Seller v. *Steamship, Pacific*, 21 Fed. Cas. No. 12, 644 Deady 17, 1 Ore. 409.

Grice v. *Oregon-Washington R. & N. Co.*, 78 Ore. 17, 150 Pac. 862.
Scranton v. *Southern Pacific Ry. Co.*, 77 Cal. App. 132, 245 Pac. 1102.
10 C. J. 147, Sec. 186.
9 Am. Jur. 872, Sec. 736.

The truck driver who delivered petitioner's coat to respondent had neither express nor implied authority to limit the carrier's liability, respondent had actual and constructive notice of his lack of authority, and petitioner is not bound by any limitation of liability by said truck driver..... 11

III.

After goods have been shipped and lost, the subsequent receipt and retention of a shipping receipt by the shipper does not constitute an assent thereto, as it is then too late to repudiate the receipt and recover back the shipper's goods.....12-13

Hunter v. *American Ry. Express Co.*, (Mo. App.) 4 S. W. (2d) 847, 851.
Adams Express Co. v. *Darden*, 265 U. S. 265, 267, 68 L. ed. 1010.
Merchant's Despatch Transportation Co. v. *Joesting*, 89 Ill. 152, 155.
Michigan Central R. R. Co. v. *Boyd*, 91 Ill. 268, 272.
Waldron v. *Fargo*, 170 N. Y. 130, 136, 62 N. E. 1077, 1078.
Benson v. *Oregon S. L. R. R. Co.*, 35 Utah 241, 246-47, 99 Pac. 1072, 1074.

Petitioner never knew of respondent's receipt until after her coat had been shipped and lost, and her subsequent retention of the receipt did not bind her to its terms..... 13

IV.

None of the cases relied upon by the Circuit Court of Appeals are in point or support the opinion of said court 13-14

Table of Authorities.

Adams Express Co. v. Darden, 265 U. S. 265, 267, 68 L. ed. 1010 12
Benson v. Oregon, etc. R. R. Co., 35 Utah 241, 99 Pac. 1072 ..... 11, 13
Caten v. Salt City Movers and Storage Co., Inc., 149 F. (2d) 428 ..... 8, 9
Chatz v. Armour Plant Employees Credit Union, 154 F. (2d) 236, 239 12
Grice v. Oregon-Washington R. & N. Co., 78 Ore. 17, 150 Pac. 62 11
Hill v. Adams Express Co., 77 N. J. L. 19, 71 Atl. 683 .. 11
Hunter v. American Ry. Express Co., (Mo. App.) 4 S. W. (2d) 847, 851 ..... 12, 13, 14
Merchant's Despatch Transportation Co. v. Joesting, 89 Ill. 152, 155 12
Michigan Central R. R. Co. v. Boyd, 91 Ill. 268, 272 12
New v. Chicago, etc. Ry. Co., 171 Ill. App. 488 11
Plaff v. Pacific Express Co., 159 Ill. App. 493, 498 10
O. & M. Ry. Co. v. Hamlin, 42 Ill. App. 441, 442 12
Scranton v. Southern Pacific Ry. Co., 77 Cal. App. 132, 245 Pac. 1102 11
Seller v. Steamship, Pacific, 21 Fed. Cas. No. 12,644, Deady 17, 1 Ore. 409 11
Waldron v. Fargo, 170 N. Y. 130, 136, 62 N. E. 1077, 1078 12
2 C. J. 575 11
10 C. J. 147, Sec. 186 11
2 Am. Jur. 81, 85 11
9 Am. Jur. 872, Sec. 736 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

ANNE FEINBERG,

Petitioner,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Anne Feinberg, prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, reversing a judgment of the District Court of the United States for the Northern District of Illinois.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a suit to recover the value of petitioner's mink fur coat, lost by respondent in an interstate shipment. Respondent contended that its liability was limited to $50, by reason of a $50 valuation inserted by it in its receipt, and made binding upon petitioner by its rules and tariffs.

Petitioner contended that she never authorized said valuation, never knew of the receipt until long after the coat was shipped and lost, and could not be bound by said rules and tariffs expressly declared void by federal statute. The trial court gave judgment for petitioner for the value of her coat, $4,880 (T. 47-50). The Circuit Court of Appeals reversed (T. 75-78).

On March 5, 1946, while a guest at the Hotel Biltmore in Phoenix, Arizona, petitioner wrapped and addressed her coat for shipment to Chicago, and her husband delivered it to a bell boy at the hotel with instructions to have the porter deliver it to the Railway Express Company (T. 22, 43-44). He said nothing to the bellboy about the contents of the package, declaring any value, limiting liability, paying carriage charges, or anything else (T. 23).

On the same day, the coat was delivered to respondent by a truck driver in the hotel's employ, who had found it in his truck (T. 37). Petitioner had no contact with said truck driver, and never authorized him to enter into any written agreement or declaration as to value on her behalf (T. 37, 44).

It was the established custom for the hotel porter to fill out receipts at the hotel for shipments by hotel guests —of which custom respondent was aware (T. 39-41). However, the custom was departed from in this case, and no receipt or declaration of value was made out in petitioner's presence at the hotel, and none accompanied this shipment to respondent (T. 41-42).

Respondent's agent undertook to make out the receipt, and asked the truck driver for the contents and value of the package (T. 38-39). The truck driver said he didn't know the contents, could place no value thereon, didn't know anything about it, and to put on the minimum value of $50 (T. 39, 26 and 64). Respondent's agent then filled

out the receipt, inserted a $50 valuation therein, and handed the receipt to the truck driver (T. 26, 39, 45).

On March 6th the coat was stolen enroute (T. 25-26).

The receipt handed to the truck driver was not discovered or known about by petitioner until March 7th, when her husband found it in their hotel box—two days after the coat was shipped, and one day after it had been lost by respondent (T. 24).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on October 29, 1947 (T. 75). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule 38 (5) (b) of this Court.

QUESTIONS PRESENTED.

The questions presented are:

1. Whether the respondent carrier's rules and tariffs can impose a $50 limitation of its liability upon the petitioner shipper—contrary to the federal statute declaring void all limitations of liability in any contract, rule, receipt or filed tariff, except where the shipper has declared or agreed in writing to a declared or released value?

2. Whether ordinary agency rules, holding that a truck driver has no implied authority to bind a shipper to a limitation of a carrier's liability, can be rejected in deciding a case arising under the Interstate Commerce Act?

3. Whether the trial court's finding of want of authority in the truck driver should be reversed by the Circuit Court of Appeals when all the evidence supports such finding and respondent introduced no contrary evidence?

4. Whether petitioner is bound by respondent's receipt, which she never authorized or knew about until long after her coat had been delivered and lost by the carrier?

REASONS RELIED ON FOR ALLOWING THE WRIT.

The general reasons relied upon for the allowance of the writ herein are:

1. The decision of the Circuit Court of Appeals that respondent's rules and tariff schedules were "conclusive", and made its receipt binding on petitioner "as to the amount she could collect in case of loss" (T. 78)—despite the fact that no written declaration of value by petitioner had been obtained, as required by statute—violates the provisions of Section 20 (11) of the Interstate Commerce Act, presents an important question of federal law which should be settled by this court, and is in square conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Caten* v. *Salt City Movers and Storage Co., Inc.*, 149 F. (2) 428, holding that there can be no such limitation of the carrier's liability except where there is a written declaration or agreement by the shipper as to a declared or released value.

2. The decision of said court that petitioner was bound by the valuation declared by a "hotel clerk" decides an important question of local law in a way in conflict with applicable local decisions, and departs from the accepted course of judicial proceedings in that (1) no hotel clerk is involved, (2) the truck driver making the delivery to respondent expressly stated that he could declare no value thereon, (3) the trial court found that no such authority existed, and (4) all the decisions hold that a truck driver has no implied authority to bind a shipper to a limitation of the carrier's liability.

3. The decision of said court that petitioner was bound to repudiate the receipt, even though it did not come to her knowledge or possession until after the coat had been shipped and lost, is in conflict with the applicable decisions, holding that the shipment contract must be made at the time of the shipment, and that after a shipment has been delivered to and lost by the carrier, it is too late for a shipper to repudiate the transaction and recover back his goods, and thereafter he need do nothing with respect to the receipt.

Wherefore, petitioner prays that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit may be granted, and that upon the hearing, the judgment of said Circuit Court of Appeals be reversed and the judgment of the trial court affirmed.

Anna Tenenberg
Petitioner,

By Karl Edwin Spofarth
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

ANNE FEINBERG,

Petitioner,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,

Respondent.

SUPPORTING BRIEF.

MAY IT PLEASE THE COURT:

The short, unsatisfactory opinion of the Circuit Court of Appeals runs counter to Section 20 (11) of the Interstate Commerce Act (See Appendix), and deprives the shipper of the protection sought to be given him thereby. If left undisturbed, this decision will become a dangerous precedent which will defeat the rights of thousands of shippers under the Act.

I.

DEFENDANT'S RULES CANNOT OVERRIDE THE STATUTE.

The Circuit Court of Appeals ignored the statute involved, and relied upon defendant's rules, receipt and tariffs, containing limitation of liability provisions expressly declared void by the statute. Thereby the opinion

effectively nullifies the statutory requirement of a written declaration of value by the shipper as a prerequisite to an effective limitation of a carrier's liability.

In order to protect shippers, Congress provided in Section 20 (11) of the Interstate Commerce Act that an interstate carrier shall issue a receipt and be liable to the holder thereof for all loss "notwithstanding any limitation of liability or * * * amount of recovery or representation or agreement as to value" in any receipt, bill of lading, contract, rule, regulation, or filed tariff, and that any such limitation shall be "unlawful and void" regardless of its manner or form (49 U. S. C. A. 20 (11)). See appendix for statute.

The only exception to the above is where the carrier establishes and maintains rates dependent upon a "value declared in writing by the shipper or agreed upon in writing as the released value of the property * * *"

Congress clearly intended that **no** limitation of liability or declared value in a contract, receipt, rule or tariff should be valid unless the shipper declares or agrees to a value in writing. Such is the construction placed upon the statute by the Court of Appeals for the Second Circuit in *Caten* v. *Salt City Movers and Storage Co., Inc.,* 149 F. (2d) 428, where the court said:

> "So as the law now stands the only limitation of liability permitted is conditioned upon a compliance with the proviso of which the material part has already been quoted. Any attempt to limit liability is prohibited except upon a declaration of value by the shipper in writing or upon a released value agreed to in writing.
>
> • • • • •
>
> "The statute makes it abundantly clear that the carrier's common law liability for full actual damages, whether or not caused by its negligence, is imposed

when it accepts goods for carriage, unless a certain specified agreement limiting that liability has been made as the result of an equally certain specified action by the shipper in respect to a voluntary valuation of his goods."

In the case at bar, the court ignored both the statute and the *Caten* Case, and relied upon the provisions of respondent's rules and form of receipt filed with its tariffs. The court quoted portions of respondent's receipt and rule 13, which together provide, in effect, that the carrier's liability is limited to a declared value of $50 in all cases unless the shipper has declared a higher value. The court concluded that the limitation of respondent's liability in its receipt was binding on petitioner because respondent's filed tariff is "conclusive" (T. 78).

The effect of this holding is to limit respondent's liability to $50, even though petitioner declared no value in writing. Such result is clearly contrary to the statute —which expressly declares void all limitations of liability in receipts, rules and filed tariffs—except where the shipper has made a written declaration or agreement as to value.

Such result is also contrary to the decision of the Circuit Court of Appeals in the *Caten* Case (149 F. (2d) 428), where it was held that any attempt to limit liability is prohibited except upon "a declaration of value by the shipper in writing or upon a released value agreed to in writing."

The opinion is wholly illogical in declaring the rule in respondent's tariff to be "conclusive". If a written agreement or declaration as to value by the petitioner exists, such declaration or agreement would be conclusive, and respondent's rules and tariffs would be immaterial; but if no such written declaration or agreement by petitioner exists, then all of respondent's rules and tariffs are void

in so far as they seek to limit its liability. Respondent's rules and tariffs cannot prevail over the statute. The trial court's judgment should have been affirmed.

This plain nullification of the statute, obvious conflict with the *Caten* decision, and illogical consideration of the issue—on an important Federal Statute and question of law—requires the issuance of the writ prayed for herein.

II.

THE TRUCK DRIVER HAD NO AUTHORITY TO LIMIT LIABILITY.

Equally faulty and unexplainable is the Appeal Court's consideration of the agency question. The opinion holds that a "hotel clerk" was petitioner's agent (T. 75, 77, 78). Strikingly, no hotel clerk is involved or known to this record.

The coat was delivered to respondent by a **truck driver** in the hotel's employ—who found it in his truck (T. 37). He had no contact with or authority from petitioner concerning any declaration of value or limitation of respondent's liability. This the respondent knew, as the truck driver expressly stated that he did not know the contents of the package and could declare no value upon it (T. 39, 26 and 64).

Under such facts, not only did the truck driver have no implied authority, but respondent was placed on notice of this fact.

The question of agency is nowhere covered in the Interstate Commerce Act—or even in respondent's rules and tariffs. It is a question governed by local law. *Plaff* v. *Pacific Express Co.*, 159 Ill. App. 493, 498.

The uniform law is that a truck driver, not in the

shipper's employ, has no implied authority to bind the shipper to a limitation of a carrier's liability in case of loss, as a carrier deals with an agent at his peril, and must take notice of the limitations which the law imposes upon his authority. *New* v. *Chicago, etc. Ry. Co.*, 171 Ill. App. 488; *Hill* v. *Adams Express Co.*, 77 N. J. L. 19, 71 Atl. 683; *Benson* v. *Oregon, etc. R. R. Co.*, 35 Utah 241, 99 Pac. 1072; *Seller* v. *Steamship, Pacific*, 21 Fed. Cas. No. 12,644, Deady 17, 1 Ore. 409; *Grice* v. *Oregon-Washington R. & N. Co.*, 78 Ore. 17, 150 Pac. 862; *Scranton* v. *Southern Pacific Ry. Co.*, 77 Cal. App. 132, 245 Pac. 1102; 10 C. J. 147, Sec. 186; 9 Am. Jur. 872, Sec. 736.

The court wholly ignored these decisions—and decided this question contrary to said decisions, including that of the federal court in the *Seller* Case.

Moreover, respondent knew that said truck driver had no authority to bind petitioner to a declared value. Respondent knew the truck driver was not in petitioner's employ, and he advised respondent that he didn't know anything about the contents or value of the package and could not declare any value on it. Respondent also knew that the customary procedure of filling out receipts with a declared value at the hotel had not been followed in this case. Respondent had both express and circumstantial notice of the truck driver's want of authority, and could not assert or rely upon an implied authority. 2 C. J. 575; 2 Am. Jur. 81, 85.

Finally the court rejected the trial court's finding that the truck driver (termed a roustabout) had no authority to bind petitioner to a declared value (T. 31, 47-49). In view of the undisputed facts supporting the trial court's finding, this refusal of the Appeals Court to be bound thereby was a violation of the established principle that a trial court's findings should not be disturbed when sup-

ported by evidence. *Chatz* v. *Armour Plant Employees Credit Union,* 154 F. (2d) 236, 239.

In holding that the non-existent hotel clerk was petitioner's agent to limit respondent's liability, the Appeals Court made no attempt to meet the above authorities—and its decision is contrary to all of them.

III.

PETITIONER NEVER RATIFIED THE RECEIPT.

The inference in said opinion that petitioner was bound by the receipt because she received and retained it without remonstrating is unfounded in fact and law. Petitioner never personally saw or knew of the receipt until after the loss was reported, and her husband never knew of or saw the receipt until the **next day after the coat had been shipped and lost** (or stolen) enroute! It was then too late to repudiate the shipment or recover back her coat, already shipped and lost. Complaint or repudiation at that stage would have been wholly unavailing. The law does not require one to perform a needless act.

All of the cases hold that a shipper's rights must be determined *before* the goods pass to the carrier and a loss occurs, and that the subsequent receipt and retention of a shipping receipt by the shipper, *after* the goods have been shipped and lost, cannot constitute an assent or bind the shipper thereto, as it is then too late for him to reject its terms and retrieve his goods. *Hunter* v. *American Ry. Express Co.,* (Mo. App.) 4 S. W. (2d) 847, 851; *Adams Express Co.* v. *Darden,* 265 U. S. 265, 267, 68 L. ed. 1010, 1013; *Merchant's Despatch Transportation Co.* v. *Joesting,* 89 Ill. 152, 155; *O. & M. Ry. Co.* v. *Hamlin,* 42 Ill. App. 441, 442; *Michigan Central R. R. Co.* v. *Boyd,* 91 Ill. 268, 272; *Waldron* v *Fargo,* 170 N. Y. 130, 136, 62 N. E. 1077, 1078;

Benson v. *Oregon S. L. R. R. Co.*, 35 Utah 241, 246-47, 99 Pac. 1072, 1074. In the *Hunter* case the court said:

> "In the absence of any evidence that plaintiff had knowledge that a bill of lading was issued until after the damage was done, we must hold that he is not bound by it. **His rights must be determined by what transpired before the time of the injury to the horse.** *American Express Co.* v. *Darden*, 265 U. S. 265, 44 S. Ct. 502, 68 L. ed. 1010." (Boldface type ours.)

The court's opinion herein is clearly contrary to these applicable decisions on this point.

IV.

DECISIONS OF THIS COURT WERE MISCONSTRUED.

The court thought the decisions cited in its footnote (T. 77) made the receipt binding on petitioner—even though she did not authorize or ratify it. None of said cases stand for such a proposition.

In the *Daniel* Case (269 U. S. 40), the receipt "was handed to and bound the sender of the goods"—obviously before the goods were lost. Moreover, and more important, the shipper expressly authorized her agent to declare a value in that case (See record in that case). The decision has no bearing on the situation here, where petitioner never authorized anyone to declare a value and never knew of the receipt until after the goods were shipped and lost.

In the *Carl* Case (227 U. S. 639), the shipper personally *signed* the receipt and limitation of liability, and then sought to avoid it on grounds of statutory invalidity.

In the *Croninger* Case (226 U. S. 491), the shipper personally delivered the goods and accepted the receipt, and the only question was what law governed.

And in the *Lindenburg* Case (260 U. S. 584), the shipper received, acted upon, assented to, and introduced the receipt in evidence "in support of his action"—and then tried to avoid it because he had not signed it.

None of said cases involve the question here presented, and certainly do not stand for the radical proposition that a carrier's rules can make its receipt binding on a shipper who has declared no value in writing.

The burden was upon respondent to obtain a written declaration or agreement as to value from petitioner if it wished to limit its liability in case of loss. *Hunter* v. *American Ry. Express Co.*, (Mo. App. 1928) 4 S. W. (2d) 847. Not having done so, respondent sought to override the statute by quoting its rules, receipts and filed tariffs.

The Circuit Court of Appeals held that respondent's rule was conclusive—thereby permitting a plain abrogation of the statute.

This decision opens the way for carriers to circumvent the statute, and deprives shippers of the protection Congress sought to afford them. The decision will affect thousands of shippers—and all interstate carriers. It presents an important federal question which has not been, but should be, settled by this court.

The decision of the Circuit Court of Appeals should be reversed, so as to correct the conflict with the *Caten* decision, and to restore to the shipper the statutory protection intended for him.

Respectfully submitted,

Karl Edwin Seyfarth

Counsel for Petitioner.

APPENDIX.

(49 U. S. C. A., Sec. 20, (11)).

Sec. 20, par. (11) *Liability of initial carrier for loss: limitation of liability; notice and filing of claim.* Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory or the District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt, or bill of lading or to any party entitled to recover thereon,

whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: * * * *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this chapter; * * *